Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1926

No. 98

LASH'S PRODUCTS COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 31, 1926

CERTIORARI GRANTED MAY 10, 1926

(33,310)

(33,310)

SUPREME COURT OF THE UNITED STATES

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LASH'S PRODUCTS COMPANY, PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1928

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 858

LASH'S PRODUCTS COMPANY (a Corporation), Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lash's Products Company (a Corporation), by its counsel, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered November 7, 1927, which denied petitioner's claim for refund of sales tax in the amount of $22,500.33. Motion for a new trial was overruled January 23, 1928.

Statement of the Case

Prior to 1919, petitioner was engaged in the manufacture of cordials, syrups, and laxative medicinal preparations.

In June 1919 it began the manufacture and sale of soft drink products, which were sold direct by its salesmen, who called upon its customers and told them that the price quoted for these soft drinks included the sales tax, which petitioner was required by statute to report and pay.

[fol. 2] Petitioner also notified its customers by letter, under date of June 28, 1919, that it was engaging in the sale of soft drinks and informing them of the prices therefor (all tax paid) and the conditions under which such soft drinks would be sold.

During the period involved in this case, petitioner received $2,475,031.44 from its soft drink sales at the prices quoted therefor, which included the tax, and paid a sales tax thereon of $247,503.16. These soft drinks were invoiced or billed to the customer without separate itemiza-

tion or indication of the price of the goods and the sales tax thereon.

After its refunding claims for $22,580.33 had been rejected by the Commissioner of Internal Revenue, petitioner brought suit in the Court of Claims for said amount, on the ground that petitioner paid the 10 per centum sales tax, not on the sum it actually received for its goods, but on the sum it actually received for its goods plus the 10 per centum sales tax included in petitioner's gross price, and the difference between these amounts is the sum sued for.

Questions Presented

1. Within the meaning of the provisions of Section 628 and 629, and in view of the provisions of Section 1312, of the 1918 revenue act, was petitioner's selling price upon which the sales tax was to have been computed the gross amount it received from its customers, which included the tax, or was its true selling price the part thereof petitioner was to retain as its own after paying the tax so included?

2. Where petitioner's customers purchased its products with the understanding that the amount paid for them included the sales tax thereon, is it legally necessary that the [fol. 3] invoice for the goods so purchased should specifically show or indicate both the amount petitioner was to receive for the goods and the tax thereon, in order that petitioner might pay the tax on said amount received for the goods and not upon the sum of that amount plus said tax.

3. Is the sales tax in this case based upon the price actually received for the product or upon the amount collected, which included both the price of the product and the sales tax thereon?

4. Where the petitioner sold soft drinks for an amount which included both the price for the goods and the sales tax thereon, and the purchaser so understood, can the Commissioner of Internal Revenue, by regulation, deprive petitioner of its right to show the true price for which its goods were sold and increase the statutory rate of sales tax from 10 to 11 per centum because petitioner's invoices or bills did not separately itemize or indicate both the price of the goods so sold and the amount of the sales tax thereon?

Reasons for Granting This Petition

1. The questions involved are important, effecting the revenue of the Government and are, therefore, of public interest and general importance.

2. At the time the case at bar was presented to the Court below, the basic question here involved had been decided in favor of petitioner's contention by the District Court in Clicquot Club Company v. United States (13 Fed. R. (2nd) 655), which was not appealed, and adversely to petitioner's contention by the District Court in Elmer Candy Company, Incorporated, v. Fauntleroy (19 Fed. R. (2nd) 664). Since the decision of the lower court herein, this question has [fol. 4] been decided adversely to petitioner's contention by the District Court in White Rock Mineral Springs Company v. Edwards (23 Fed. R. (2d) 539), and later in favor of petitioner's contention by the Circuit Court of Appeals in Elmer Candy Company, Incorporated, v. Fauntleroy, decided February 2, 1928, not yet reported, which reversed the decision of the District Court referred to above in that case.

The net result of the interpretation of the law herein by the courts to date show a Circuit Court of Appeals differing with the Court of Claims, and one District Court disagreeing with another.

3. Many similar cases are pending in the courts, and it has been stipulated that forty nine of such cases now pending in the Court of Claims shall be decided in accordance with the final disposition of the case at bar.

4. It is in the public interest to have the questions here involved decided by the court of last resort.

5. The customer bought the goods with the understanding that the tax was included in the price he paid the company. If the company is required to pay a tax on the amount of tax so paid to it by the customer the legal tax rate of 10 per centum is thereby increased to 11 per centum on the price for which the goods were sold, for which there is no authority in the statutes.

6. Petitioner by its salesmen informed its customers that the price quoted for its soft drink products and for which

it sold such products to them included the sales tax, which the statute required it to pay.

[fol. 5] 7. The Commissioner of Internal Revenue was without legal authority to require petitioner to set up or indicate in its invoices or bills the price of its goods in one item and the amount of the sales tax thereon in another item, in order for petitioner to avoid being required to pay the sales tax on both the price for which it sold its products and also on the sales tax thereon so paid by the customer.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Claims should be granted.

Lash's Products Company, by A. R. Serven, Counsel.
Daniel R. Forbes, Richard D. Daniels, of Counsel.

[fol. 1] In Court of Claims of the United States

No. D-412

Lash's Products Company, a Corporation,

vs.

The United States

I. History of Proceedings

On June 30, 1924, the plaintiff filed its original petition.

On August 30, 1924, a general traverse was entered under Rule 34.

On May 21, 1927, by leave of court, the plaintiff filed its Amended Petition.

Said Amended Petition is as follows:

II. Amended Petition—Filed May 21, 1927

To the Honorable the Court of Claims:

The claimant in the above-entitled cause respectfully represents to the Honorable Court:

I

The claimant is a corporation duly organized and existing under the laws of the State of California, having its

principal place of business and office in the City of San Francisco, in said State, with established places of business and offices in the City of Chicago, State of Illinois, and in the City of New York, State of New York, and is now and has been continuously engaged since 1884 in the business of manufacturing and selling cordials, syrups and laxative medicinal preparations.

II

The claimant in June of the year 1919 for the first time entered into the manufacture of soft-drinks and therefore [fol. 2] became subject to the provisions of the Act of Congress entitled, "An Act to Produce Revenue and For Other purposes," approved February 24, 1919, and especially subject to the provisions of the last clause of Section 628 (a) therein contained and reading as follows:

Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one half of one per centum of alcohol, sold by the manufacturer, producer or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold.

III

The claimant, beginning in the month of June, 1919, offered the soft-drinks of its manufacture direct to its retail customers through its own salesmen at certain gross or list prices, which prices included the 10% sales tax thereon. Said salesmen personally called upon customers of claimant and advised them that the gross or list price so quoted was the claimant's selling price and in addition thereto an amount equal to ten per centum thereof, said additional amount being the 10% sales tax thereon as imposed by the Revenue Act of 1918 aforesaid. Claimant's customers were universally so informed that the said list [fol. 3] or gross price was inclusive of the said 10% sales

tax which the claimant as manufacturer was required to report and pay to the defendants, and the said customers so understood.

IV

The claimant, consistent with the provisions of the Revenue Act of 1918, through its three regular established offices aforesaid, reported each month to the collector of internal revenue for the appropriate district the total amount of sales of such taxable soft drinks sold during the preceding month, and listed in said monthly return the total gross amounts which the claimant had received from its customers, which included said tax of 10% of the selling price. Claimant avers that said monthly returns were prepared by clerks in its employ who had no previous experience with sales tax and that through mistake of fact reported the total receipts as sales subject to the said sales tax and computed and paid ten per centum thereon, whereas the tax should have been one-eleventh of the gross receipts, said gross receipts in fact consisting of the sum of the selling price plus ten per centum thereof. Claimant, solely by mistake of fact in relation to figures, reported and paid to the defendants as sales tax ten per centum of the whole gross price it had received from its customers, whereas in fact said gross price was the sum of (1) claimant's selling price and (2) ten per centum thereof, which was the sales tax so imposed as aforesaid, and the customers of the claimant had been so informed and so understood.

[fol. 4]

V

Claimant reported and paid to the defendants as aforesaid the following:

Gross amount (which included 10% tax), $2,475,061.44; tax paid, $247,506.25.

Claimant avers that it was in error in reporting and paying to the defendants ten per centum of the gross amounts so received from the customers which included in it ten per centum of the actual selling price and avers that the defendants were entitled, under the provisions of the Revenue Act of 1918, only to one-eleventh of said gross amount which is equivalent to ten per centum of said actual selling price. Claimant, for greater particularity, annexes hereto

and makes a part of this petition, and identified as Exhibit "A," a detailed statement of the tax reported and paid.

VI

Claimant, on March 20th, 22nd, and 26th, 1923, filed with the Commissioner of Internal Revenue of the United States, in accordance with the statutes in such case made and provided, claims for the refunding of a total of $22,500.33, which represented the difference between the total sales tax so erroneously paid by claimant to defendants, and the amount actually due and imposed by said Revenue Act of 1918. Claimant's refunding claims were on November 5th, 6th, and 13th, in the year 1923, by letters addressed to each of the said offices of the claimant, rejected by the Commis- [fol. 5] sioner of Internal Revenue of the United States in the total sum of $22,500.33, the said letters of rejection stating among other things as follows:

You have now submitted affidavits from the manager of the company and from several of your salesmen and customers in which it is stated that it was explained by the salesmen to the customers that the list price was the total of the seling price and the tax. The evidence shows, however, that you did not indicate the tax in such a way as not to be a part of and included in the price for which your product sold, and since the amount for which you are seeking refunds was paid upon the selling price for the beverages, the tax has been properly paid, even though you contemplated tax in the price for which your product sold.

VII

The collection and retention of that part of the sales tax amounting to $22,500.33 not refunded to claimant was unlawful for the following reasons:

(1) Claimant, dealing with its retail trade by means of salesmen who personally called upon their customers, took the most efficient means to inform said customers that the list or gross prices quoted were the sum of claimant's selling price and the tax due and payable to defendants, and did so inform said customers and said customers so understood. Said gross or quoted price was represented to be and in fact did amount to the claimant's selling price plus

the sales tax of ten per centum thereon. Claimant clearly indicated to its customers that it was required by the provisions of the Revenue Act of 1918 to pay to defendants the [fol. 6] sales tax which was included in said gross price, and the said customers so understood.

(2) Claimant, in paying ten per centum of the gross amount received from its customers, paid to the defendants an amount which was not equal to ten per centum of the selling price, but was in fact an amount equal to ten per centum of the sum of the selling price and the tax, or one hundred and ten per centum of the actual selling price as offered by the claimant and fully understood by the customers purchasing said products. Claimant avers that the defendants received from it a tax upon a tax to the extent and amount of the refund claimed by the claimant and wrongfully rejected and illegally and unequitably withheld by defendants as aforesaid.

VIII

Claimant avers that it is and has been the owner of the claim hereinbefore set forth continuously from its inception, and has never sold or assigned the same or any part thereof or interest therein; that claimant is justly entitled to the amounts herein claimed from the United States after allowing all just credits and set offs; that claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government or aided or abetted or given encouragement to its enemies, and claimant believes that the facts stated herein are true.

[fol. 7] IX

Claimant therefore prays judgment against the United States for the sum of $22,[illegible], and interest thereon.

Lash's Products Company, by Forbes and Daniels, Its Attorneys, by Daniel R. Forbes. A. R. Serven, Esq., of Counsel.

[fol. 8] EXHIBIT "A" TO AMENDED PETITION

Itemized Statement of Tax Reported and Paid and Refund Claimed

Lash's Products Company, San Francisco Office

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1919	July	1,879.64	187.96	170.88	17.08
	Aug.	5,806.16	580.62	527.83	52.79
	Sept.	7,554.80	755.49	686.81	68.68
	Oct.	11,359.24	1,135.92	1,032.66	103.26
	Nov.	13,765.61	1,376.56	1,251.42	125.14
	Dec.	22,004.01	2,200.40	2,000.36	200.04
1920	Jan.	16,336.73	1,633.67	1,485.16	148.51
	Feb.	17,073.18	1,707.32	1,515.74	251.58
	Mar.	19,572.48	1,957.27	1,779.33	177.94
	Apr.	13,500.10	1,350.10	1,209.19	120.91
	May	10,186.21	1,018.62	926.02	92.60
	June	11,378.22	1,137.82	1,034.38	103.44
	July	7,725.92	772.59	702.36	70.23
	Aug.	9,656.25	965.63	877.84	87.79
	Sept.	12,947.56	1,294.76	1,177.05	117.71
	Oct.	15,290.56	1,529.04	1,390.85	139.09
	Nov.	14,504.35	1,450.44	1,318.76	132.68
	Dec.	7,913.42	791.34	719.40	71.94
1921	Jan.	5,790.05	579.01	526.37	52.64
	Feb.	5,534.46	553.45	503.13	50.32
	Mar.	4,270.92	427.09	388.26	38.83
	Apr.	3,346.14	334.61	304.19	30.42
	May	2,048.36	204.80	186.27	18.53
	June	2,786.72	278.63	253.29	25.34
	July	1,100.90	110.10	100.54	10.56
	Aug.	1,611.00	161.10	146.46	14.64
	Sept.	2,402.56	240.26	218.41	21.85
	Oct.	2,630.25	263.03	239.83	24.10
	Nov.	1,746.80	175.00	159.72	15.97
	Dec.	1,585.54	156.55	141.43	14.14
	Total	253,868.54	25,385.27	22,388.00	2,338.84

[fol. 9] Lash's Products Company, New York office

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1919	June	7,458.70	745.87	678.03	67.80
	July	35,766.10	3,576.61	3,251.46	325.15
	Aug.	56,059.20	5,605.92	5,096.29	509.63
	Sept.	65,573.70	6,557.17	5,961.06	596.11
	Oct.	91,230.70	9,123.07	8,293.70	829.37
	Nov.	94,573.80	9,457.78	8,597.07	859.79
	Dec.	177,151.00	17,717.16	16,106.51	1,610.65

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1920	Jan.	127 474 00	12 747 40	11 588 55	1 158 85
	Feb.	100 700 50	10 070 05	9 150 86	920 19
	Mar.	190 000 00	19 000 00	17 271 86	1 728 14
	Apr.	79 596 40	7 955 64	6 966 36	989 28
	May	55 197 40	5 519 74	5 109 56	410 18
	June	28 663 70	2 866 37	2 665 88	200 49
	July	18 018 50	1 801 85	1 710 80	171 05
	Aug.	17 736 20	1 773 62	1 612 38	161 24
	Sept.	25 826 70	2 582 67	2 330 61	252 06
	Oct.	26 177 70	2 617 77	2 379 79	237 98
	Nov.	25 328 50	2 533 05	2 249 80	283 09
	Dec.	16 368 40	1 636 84	1 488 04	148 80
1921	Jan.	11 358 20	1 135 82	1 032 56	103 26
	Feb.	7 519 10	751 91	683 55	68 36
	Mar.	1 980 50	198 05	168 60	16 45
	Apr.	3 171 70	317 17	288 34	28 83
	May	5 407 70	540 77	515 25	25 52
	June	2 571 60	257 16	233 78	23 38
	July	1 801 20	180 12	163 75	16 37
	Aug.	2 725 80	272 58	247 33	25 25
	Sept.	2 598 10	259 81	236 92	22 89
	Oct.	2 761 70	276 07	250 97	25 10
	Nov.	3 288 30	328 85	298 01	30 84
	Dec.	2 630 00	263 00	240 91	24 09
	Total	1 261 000 70	126 100 07	114 681 52	11 418 15

[fol. 10] Lash's Products Company, Chicago office

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1919	July	8 945 30	894 52	813 62	80 90
	Aug.	11 025 40	1 102 54	1 000 80	101 74
	Sept.	16 858 50	1 685 85	1 533 14	152 71
	Oct.	26 911 10	2 691 11	2 446 46	244 65
	Nov.	59 275 50	5 927 55	5 387 77	539 78
	Dec.	85 802 30	8 580 23	7 800 20	780 03
1920	Jan.	76 708 70	7 670 87	6 973 52	697 35
	Feb.	90 000 00	9 000 94	8 272 05	827 89
	Mar.	113 145 10	11 314 51	10 285 92	1 028 59
	Apr.	51 876 40	5 187 65	4 716 05	471 60
	May	70 819 10	7 081 91	6 438 11	643 80
	June	43 040 50	4 304 05	3 912 77	391 28
	July	27 521 40	2 752 14	2 501 91	250 23
	Aug.	27 643 70	2 764 37	2 513 06	251 31
	Sept.	32 804 80	3 280 48	2 981 80	298 68
	Oct.	50 292 00	5 029 20	5 090 27	509 93
	Nov.	41 727 40	4 172 74	3 793 40	379 34
	Dec.	13 362 30	1 336 23	1 230 21	126 02
1921	Jan.	17 922 00	1 792 20	1 629 35	162 94
	Feb.	14 461 90	1 446 18	1 314 58	131 60
	Mar.	8 262 30	826 25	754 77	75 48

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
	Apr	3,750.40	375.04	341.76	31.18
	May	4,044.50	404.45	367.68	36.77
	June	3,077.80	307.78	279.80	27.98
	July	2,127.30	212.73	193.39	19.34
	Aug	3,373.50	337.35	306.23	30.12
	Sept	6,957.00	695.70	695.18	60.52
	Oct	15,208.50	1,520.85	1,382.50	138.26
	Nov	12,795.30	1,279.53	1,163.21	116.32
	Dec	6,053.70	605.37	550.34	55.03
	Total	959,596.20	95,955.62	87,232.37	8,723.25

[fol. 11]

Summary

Total gross receipts	Total tax paid 1-10	Total tax due 1-11	Total refund claimed
2,475,031.44	247,502.36	224,911.02	22,591.24

[fol. 12] *Duly sworn to by Warren Spicker. Jurat omitted in printing.*

[fol. 13] III. General Traverse.—Filed May 24, 1927

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

J. H. S.

IV. Argument and Submission

On October 12, 1927, this case was argued and submitted on merits by Mr. A. R. Serven, for the plaintiff, and by Mr. J. H. Sheppard, for the defendant.

[fol. 14] V. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—Filed November 7, 1927

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Special Findings of Fact

I

The plaintiff is a corporation duly organized and existing under the laws of the State of California, with its principal office in the city of San Francisco, California, and branch offices in Chicago, Illinois, and New York City, New York, and since the year 1884 it has been continuously engaged in the manufacture and sale, at wholesale, of cordials, syrups, and laxative medicinal preparations.

II

The plaintiff was organized and incorporated under the name of Lash's Bitters Company, under which name it carried on its business until during the year 1920, when its name was duly changed to Lash's Products Company, but without change in the status or identity of the company.

III

Beginning in June, 1919, the plaintiff manufactured and sold soft-drink products, the sales of which were made direct to customers in the retail trade on orders obtained by its salesmen.

Plaintiff's salesmen personally called upon the customers aforesaid and told them that the prices quoted to them on its nonalcoholic beverages included the sales tax, and that payment thereof would be made by the plaintiff.

The plaintiff also notified its customers by letters dated June 28, 1919, reading in part:

"We are pleased to quote you prices on all our goods as follows:

	Less than 5 cases	5 cases 10 cases	10 cases 100 cases
Lash's Bitters (officially classed as a medicine, not a beverage), per case	$10.00	$9.50	$9.00
Homer's Ginger Cordial, nonalcoholic (all taxes paid)	8.00	7.50	7.00
Hill's Horehound and Irish Moss, nonalcoholic (all taxes paid)	8.00	7.50	7.00
Clark's Cordial, nonalcoholic (all taxes paid)	8.00	7.50	7.00

[fol. 15] "Terms: All goods shipped with sight draft for the amount of invoice (less 2% discount allowed for cash) attached to bill of lading.

"We allow freight on shipments of ten (10) or more cases and orders may be assorted to suit your requirements.

"You will please note that we pay the tax on our nonintoxicating goods—which amounts to 10%—and as they sell at 10c or more per drink, it leaves a nice margin of profit for you."

IV

During the period involved in this suit the plaintiff manufactured and sold to its said customers the aforesaid soft-drink products, and from the said customers received in return $2,475,031.44. All the goods so sold were invoiced or billed to the customer at prices which were not itemized in the bill or invoice so as to show any tax, and payment in each instance was made by the customer to the plaintiff of the total amount invoiced less agreed discount for cash.

The amounts received on account of such sales were reported by plaintiff monthly to the proper officers of the Bureau of Internal Revenue, and in monthly current payments a total of $247,503.16 was paid by plaintiff to the United States as the 10 per cent beverage tax on said sales, under the revenue act of 1918, and as follows:

1919

June	$745 83
July	4,658 89
August	7,294 08
September	8,994 71
October	12,950 10
November	16,771 50
December	28,306 81

1920

January	22,040 94
February	21,538 21
March	32,281 28
April	13,873 39
May	11,620 26
June	8,807 24
July	5,416 58
August	5,503 62

September	7,143 91
October	10,075 91
November	7,866 13
December	3,781 41

1921

January	3,507 13
February	2,751 84
March	1,438 29
April	1,027 72
May	956 12
June	843 57
July	508 95
August	781 03
September	1,135 77
October	2,061 95
November	1,794 07
December	1,025 92
	247,503 16

The said sum of $247,503.16 is retained in the Treasury of the United States.

V

On or about March 20, 1923, the plaintiff filed claims with the Commissioner of Internal Revenue for the refund to it of $22,500.33 as being the amount erroneously computed and overpaid by it as beverage tax on the said sales of its soft-drink products. On November 5, 6, and 13, 1923, the said claims were finally disallowed by the Commissioner of Internal Revenue on the ground that plaintiff "did not indicate the tax in such a way as not to be a part of and included in the price" for which the product was sold.

[fol. 16] CONCLUSION OF LAW

From the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this

cause, the amount thereof to be entered by the clerk and collected by him.

OPINION

GRAHAM, Judge, delivered the opinion of the court:

The plaintiff was a manufacturer and seller of certain so-called soft drinks and beverages. Sales were made to the retail trade, who were informed by the salesmen that the price of plaintiff's product would not be increased on account of the beverage tax imposed by the revenue act of 1918, but that the price would remain the same as before the act was passed. Plaintiff's customers understood that it would pay the tax on beverages, and that they would not be billed therefor. During the period involved in the instant case the plaintiff received $2,475,031.44 from sales and paid to the collector of internal revenue 10 per cent thereof. This suit is brought to recover the sum of $22,-588.03, with interest, upon the ground that in paying 10 per cent on the amount received from sales under the aforesaid arrangement with its customers it had paid a tax on a tax, and that the price at which its product was sold was not the price actually received from its customers, but that sum less the tax paid; that the product having been sold for $8, the 10 per cent tax paid amounting to 80 cents, the price the plaintiff received for its product was $7.20, and that it was only liable to pay a tax of 10 per cent on this latter sum.

The statute provides that the manufacturer shall pay "ten per centum of the price for which [the product is] so sold." The question involved is: What shall be taken as the selling price, the sum actually received or another sum less the tax paid?

The plaintiff contends that if the tax is levied upon the sum received it is being taxed upon a tax; that it pays not only a tax upon the sum received for its product but also upon the tax paid on it. The defendant, on the other hand, contends that the "price" at which sold means what it says; that is, the sum actually paid by the buyer to plaintiff, the price which the plaintiff on its contract with the purchaser could collect from the purchaser. In the case of the J. Hungerford Smith Grape Juice Co., 63 C. Cls. 140, decided February 14, 1927, this court, in passing upon the question whether goods sold with a discount of 2% on the price if

paid within 10 days were to be taxed on the billing price or the price less 2% where the bill had been paid within 10 days, held that the manufacturer was only liable for tax on the price fixed by the agreement between the parties and paid to the manufacturer. The price was not determined until the buyer elected to pay in 10 days.

Plaintiff says in effect: "I billed the goods at $8, but I paid a tax of 80 cents, which is more than I should have [fol. 17] paid, because as $8 embraced the tax, the tax being 10 per cent, the amount that I actually received could only be ascertained by dividing $8 by 110, or $7.263+, and the tax on this sum would be $0.726+, and as 80 cents was paid I have overpaid my tax by the difference between the last-named sum and $0.726+."

The regulation of the Commissioner of Internal Revenue allowed the plaintiff to either add the tax to the selling price or, if it intended, as in this case, to pay the tax, to bill the goods with the price and the tax stated separately, and of this regulation the plaintiff must be visited with notice. It was a reasonable regulation and intended to save time, labor, and complications on the part of both the Government and plaintiff. The plaintiff did not observe the regulation. It billed the goods at $8, received that amount in payment therefor, and paid the tax upon this basis during six months of 1919, and for the years 1920 and 1921; in all, 30 months. It is evident that plaintiff thought that the tax was to be levied upon the price at which it sold the goods and which the customer paid therefor, and we think it reached the right conclusion.

The petition should be dismissed, and it is so ordered.

Moss, Judge; Booth, Judge, and Campbell Chief Justice, concur.

Hay, Judge, absent.

[fol. 18] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the Seventh day of November, A. D. 1927, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and

shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered and decreed that the United States have and recover of and from the plaintiff, as aforesaid, the sum of Two hundred fourteen dollars and eighty-two cents ($214.82), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

VII. Proceedings After Entry of Judgment

On January 6, 1928, the plaintiff filed a motion for a new trial.

On January 23, 1928, the court entered the following order on said motion:

Order

It is ordered by the court this 23d day of January, 1928, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,310. Court of Claims. Term No. 858. Lash's Products Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed March 24th, 1928. (33,310.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 28, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
APR 25 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1927

NO. 98

LASH'S PRODUCTS COMPANY (A CORPORATION),
PETITIONER,
vs.
THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. R. SERVEN,
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RICHARD D. DANIELS,
Of Counsel.

PRESS OF FRANK H. SHORT, 900 15TH STREET NORTHWEST

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1927

No. 858

LASH'S PRODUCTS COMPANY (A CORPORATION),
PETITIONER,
vs.
THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case arises under the Revenue Act of 1918. (R. p. 13; Finding IV.)

The opinion of the Court of Claims in this case has not yet been officially reported.

The date of the judgment in this case is November 7, 1927. (R. p. 16-17.)

Petitioner's motion for new trial was overruled on January 23, 1928. (R. p. 17.)

Petitioner claimed in the Court below that it was required by law to pay the beverage tax on only 10/11ths of the amounts it received from its customers, which included the price of its products and also the 10 per centum beverage tax thereon, while the Court below held that it was required to pay the 10 per centum beverage tax upon the entire amount received by it from its customers. (R. p. 7-8; Section VII.

Amended Petition; Opinion of Court, R. p. 16, Second Paragraph.)

The jurisdiction is invoked under Chapter 229, Section 3 (b) of "An Act to Amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes," approved February 13, 1925. (43 Stat. L. 939.)

Attention is invited to the following cases, under which it is believed the writ prayed for should be granted:

Forsyth v. *Hammond* (166 U. S. 506; 41 L. ed. 1095);

Fields v. *United States* (205 U. S. 292; 51 L. ed. 807);

Hamilton Brown Shoe Co. v. *Wolf Bros. Co.* (240 U. S. 251; 60 L. ed. 629);

Magnum Import Company v. *Coty* (262 U. S. 159; 67 L. ed. 922).

STATEMENT OF THE CASE

Prior to 1919, Petitioner was engaged in the manufacture of cordials, syrups, and laxative medicinal preparations. (R. p. 12, Finding I.)

In June, 1919, it began the manufacture and sale of soft drink products, which were sold direct by its salesmen, who called upon its customers and told them that the price quoted for these soft drinks included the sales tax of 10 per centum, which petitioner was required by statute to report and pay. Petitioner also notified its customers by letter, under date of June 28, 1919, to the same effect. (R. p. 12-13; Finding III.)

During the period involved in this case, petitioner received $2,475,031.44 from its soft drink sales at the prices quoted therefor, which included the tax, and reported said sales and paid the 10 per centum beverage tax thereon under the Revenue Act of 1918 of $247,503.16. (R. p. 12-13, Findings III, IV.) These soft drinks were invoiced or billed to the customer without separate itemization or indication of the price of the goods and the sales tax thereon. (R. p. 13, Finding IV.)

Petitioner duly filed refunding claims with the Commissioner of Internal Revenue for $22,500.33, claimed to have been erroneously computed and overpaid by it as beverage tax on said sales, which claims were disallowed by said Commissioner on the ground that petitioner "did not indicate the tax in such a way as not to be a part of and included in the price," for which the product was sold. (R. p. 14, Finding V.) Thereafter, petitioner brought suit in the Court of Claims for said amount, on the ground that it had paid a 10 per centum beverage tax on the entire amount received from its customers for soft drinks, which included the said 10 per centum sales tax, instead of on the actual price it received for the soft drinks "so sold." (R. p. 7-8, Section VII, Amended Petition.)

THE LAW

The provisions of the revenue laws involved in the case are Sections 628 and 629 of the 1918 Revenue Act (40 Stat. L. 1116), which are as follows:

> Sec. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by

sections 313 and 315 of the Revenue Act of 1917—

(a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and

(b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon.

SEC. 629. That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

THE TREASURY REGULATIONS

Treasury Regulations 52 related to the sales tax on soft drinks and other beverages under the 1918 Revenue Act. Article 8 of said Regulations, which was in effect during the period here in question, was as follows:

> Art 8. *Basis for tax; sale price.*—The tax is on the sale by the manufacturer of the beverage. It is measured by the price for which the beverage is sold. It is on the actual sales price of the beverage sold and not on the list price where that differs from the sales price. If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price, but where the tax is billed as a separate item it is not to be considered as an increase in the sale price. The tax is payable in respect to a sale made whether or not the purchase price is actually collected.

ERRORS OF THE COURT BELOW

The Court below erred in holding as follows:

1. That, within the meaning of the provisions of Sections 628 and 629, and in view of the provisions of Section 1312, of the 1918 Revenue Act, the petitioner's selling price upon which the sales tax was to be computed was the gross amount it received from its customers, which included the tax, instead of its true selling price, which was the part thereof petitioner was to retain as its own after paying the tax so included.

2. That, where petitioner's customers purchased its products with the understanding that the amount paid for them included the sales tax thereon, it was legally necessary that the invoice for the goods so purchased

should separately show or indicate both the amount petitioner was to receive for the goods and the tax thereon, in order that petitioner might pay the tax on the amount actually received for its goods, instead of on the total amount it received from its customers.

3. That the sales tax was due and payable upon the entire amount petitioner received from its customers in connection with its sale of soft drinks to them.

4. That, where the petitioner sold soft drinks for an amount which included both the price for the goods and the sales tax thereon, and the purchaser so understood, the Commissioner of Internal Revenue can, by regulation, deprive petitioner of its right to show the true price for which its goods were sold and thereby increase the statutory rate of sales tax from 10 to 11 per centum of the price it actually received for its soft drinks, because petitioner's invoices or bills did not separately itemize or indicate both the price of the goods so sold and the amount of the sales tax thereon.

ARGUMENT

The petitioner here endeavored to pass the sales tax on to the customers by informing them that the price for which its soft drink products could be purchased included the 10 per centum sales tax thereon, and its customers purchased its soft drinks with that understanding. That petitioner had the right to pass the tax on to its customers is supported by American Express Company v. Michigan (177 U. S. 404; 44 L. ed. 823). Section 1312 of the 1918 Revenue Act seems also to recognize petitioner's right to do so. Petitioner did not separately itemize in its invoices or bills the price of the soft drinks and the tax thereon.

Finding III (R. p. 12) shows that petitioner began the manufacture and sale of soft drink products in June, 1919. The Court below appears to have overlooked this fact, as the second sentence of its opinion (R. p. 15) is as follows:

> "Sales were made to the retail trade, who were informed by the salesmen that the price of plaintiff's product would not be increased on account of the beverage tax imposed by the revenue act of 1918, but that the price would remain the same as before the act was passed."

The revenue act of 1918 was approved February 24, 1919. As petitioner did not begin the manufacture and sale of its soft drinks until June, 1919, the Court below was in error in its understanding that the price of petitioner's soft drinks "would remain the same as before the act was passed." Evidently, this misapprehension and the effort of the Regulation (quoted above) to prevent petitioner from passing the sales tax on to the customer unless "the tax is billed as a separate item," persuaded the lower Court that the Commissioner of Internal Revenue had power to limit the evidence of purchaser's agreement to pay the tax to the statements in the invoices therefor, regardless of the terms under which the goods were sold.

CERTIORARI SHOULD BE GRANTED

Petitioner submits this writ should be granted for the following reasons:

1. The questions involved are important, effecting the revenues of the government and are, therefore, of public interest and general importance.

The questions here involved relate to the proper administration of the sales tax on soft drinks, under the provisions of the revenue act of 1918, and apply equally to all of the various *ad valorem* sales taxes under the 1918 and subsequent revenue acts. They are, therefore, of great public interest and importance to the Government, the citizens, and the individual taxpayers. A very substantial portion of the government revenues is derived from the *ad valorem* sales taxes.

The Court may therefore very properly grant the writ in this case.

2. At the time the case at bar was presented to the Court below, the basic question here involved had been decided in favor of petitioner's contention by the District Court in *Cliequot Club Company* v. *United States* (13 Fed (2nd) 655), which was not appealed, and adversely to petitioner's contention by the District Court in *Elmer Candy Company, Inc.* v. *Fauntleroy* (19 Fed. (2nd) 664). Since the decision of the lower court herein, this question has been decided adversely to petitioner's contention by the District Court in *White Rock Mineral Springs Company* v. *Edwards* (23 Fed. (2nd) 539), and later in favor of petitioner's contention by the Circuit Court of Appeals in *Elmer Candy Company, Inc.* v. *Fauntleroy*, decided February 2, 1928, not yet reported, which reversed the decision of the District Court referred to above in that case. The net result of the interpretation of the law herein by the Courts to date show a Circuit Court of Appeals differing with the Court of Claims, and one District Court disagreeing with another.

There is a lack of uniformity in the decisions of the District Courts, a Circuit Court of Appeals, and the Court of Claims.

Perhaps the most important reason for granting to this Court authority to issue writs of certiorari is for the purpose of securing uniformity of decision in the construction and application of federal statutes. At the time the lower Court entered its judgment dismissing petitioner's case, two Federal District Courts had decided cases involving regulations containing identical provisions as to the evidence on which taxpayers could pass on to their customers the *ad valorem* taxes laid by the revenue act of 1918. The first was *Cliequot Club Company* v. *United States* (13 Fed. (2nd) 655), where the law and regulations involved in this case were under investigation. In a well considered opinion, the Court discussed the various questions entering into the case, including the Commissioner's interpretation of Article 8 of said Regulations (O. D. 28; St. 1-21-124, appearing in Sales Tax Rulings Bulletin No. S.T.1-21 for January, 1921), and held that the price of plaintiff's goods so sold was the amount it received for its soft drinks, exclusive of the amount it received on account of the 10 per centum tax thereon, and gave judgment for the plaintiff. No appeal was taken in this case. The second case arose under the provisions of Section 900, subsection (9) of the 1918 revenue act, which laid a 5 per centum tax on the price for which candy was sold, and there, as here, there was a Treasury Regulation prescribing an identical method by which the plaintiff could pass on the sales tax on candy to the purchaser. (*Elmer Candy Company, Inc.* v. *Fauntleroy, supra*). This case was appealed and since the Court of Claims decided the case at bar the Court of Appeals in a careful and exhaustive opinion discussed the various questions in the case and reversed the decision of the District Court (*Elmer Candy*

Company, Inc. v. *Fauntleroy* (24 Fed. (2nd) 95, Adv. Op.)

Since the decision of the case at bar by the lower Court, the Federal District Court dismissed the petition in *White Rock Mineral Springs Company* v. *Edwards* (23 Fed. (2nd) 539, Adv. Op.), involving the identical questions in the instant case, evidently following the opinion of the Court below herein.

It is therefore of great importance that the opinion of this Court be had, in order to insure uniformity of decision on the points here involved.

The Court may, therefore, very properly grant the writ in this case.

> 3. Many similar cases are pending in the courts, and it has been stipulated that forty-nine of such cases now pending in the Court of Claims shall be decided in accordance with the final disposition of the case at bar.

When the Court below convened at the beginning of its present term, the Chief Justice commented on the large number of beverage tax cases pending in that court, and suggested that a serious effort should be made to stipulate that as many as possible of these cases should be determined by a test case. In view of this suggestion, one attorney, according to his brief *amicus curiae*, filed in the Court below in connection with the case at bar, stipulated that forty-nine of his beverage tax cases in that court should abide by the final decision herein. It is also understood that several other beverage tax cases not so stipulated are pending in the court below and others in the local Federal courts.

Under these circumstances, it would appear that the

questions here involved are of grave public importance and should be determined by the decision of the Court of last resort.

The Court may, therefore, very properly grant the writ in this case.

4. It is in the public interest to have the questions here involved decided by the Court of last resort.

This Court has not heretofore had occasion to construe and apply the provisions of Sections 628 and 629 of the revenue act of 1918 (above quoted), or determine whether under those provisions the Commissioner of Internal Revenue has the right to limit petitioner's proof of the method by which it passed the beverage tax on to the customer to the mere form of its invoices therefor. As held in *Clicquot Club Company* v. *United States* (13 Fed. (2nd) 655; not appealed), the Commissioner's Regulation (Article 8, quoted above), attempts to limit this proof to form rather than substance, and the Court below seems to have fallen into the same error. In *Elmer Candy Company, Inc.* v. *Fauntleroy* (24 Fed. (2nd) 96, Adv. Op.), which involved an identical regulation concerning the effect of the contents of the invoice covering goods sold, the Court of Appeals reversed a decision of the District Court (19 Fed. (2nd) 664), and in discussing that regulation said:

"Apparently the only thing that could prevent a recovery in this case is the technicality regarding the manner of rendering invoices. We think what was done by plaintiff in notifying its customers that the price would include the tax comes within the meaning and intent of clause B above

> quoted, and that, plaintiff having in effect stated to the purchasers in quoting prices what portion represented the prices charged for the article and what portion represented the tax, the technicality should be disregarded."

The Court may, therefore, very properly grant the writ in this case.

> 5. The customer bought the goods with the understanding that the tax was included in the price he paid the company. If the company is required to pay a tax on the amount of tax so paid to it by the customer the legal tax rate of 10 per centum is thereby increased to 11 per centum on the price for which the goods were sold, for which there is no authority in the statutes.

When it is remembered that the petitioner received from its customers not only the actual price for which its soft drinks were sold, but also an additional 10 per centum thereof with which to pay the 10 per centum beverage tax thereon, it will be observed that if petitioner is required to pay a beverage tax of 10 per centum of the entire amount so received by it from its customers in connection with its sale of soft drinks to them it will be required to pay a beverage tax of 11 per centum upon the real or true price it received from its customers for its soft drinks sold to them. Nowhere in the 1918 revenue act is there any authority, either direct or indirect, for the imposition of a beverage tax at the rate of 11 per centum of the price for which its soft drinks were "so sold."

As the final decision in this case will control so many similar cases involving the identical questions in this case, it is respectfully submitted that the case at bar

is of such grave importance as to fully justify the granting of certiorari as prayed for.

The Court may, therefore, very properly grant the writ in this case.

6. Petitioner by its salesmen informed its customers that the price quoted for its soft drink products and for which it sold such products to them included the sales tax, which the statute required it to pay.

If the facts found by the lower court in this case are not sufficient to enable petitioner to pass the 10 per centum beverage tax on to its customers, then it would appear that a most serious injustice will be done to petitioner and many other taxpayers subject to *ad valorem* sales taxes under the 1918 and subsequent revenue acts, and for this reason the questions here involved are of such great public importance as to fully justify the granting of certiorari for the review of this case by the highest Court of the land.

The Court may, therefore, very properly grant the writ in this case.

7. The Commissioner of Internal Revenue was without legal authority to require petitioner to set up or indicate in its invoices or bills the price of its goods in one item and the amount of the sales tax thereon in another item, in order for petitioner to avoid being required to pay the sales tax on both the price for which it sold its products and also on the sales tax thereon so paid by the customer.

Nowhere in the revenue act of 1918 is there contained any authority, either direct or indirect, empowering the Commissioner of Internal Revenue to

prescribe the method by which petitioner must pass the beverage tax on its soft drink products on to its customers, or limit the evidence to prove that it had done so. When the Commissioner by regulation attempts to prescribe one solitary method of accomplishing this, to be established by evidence of one single act by petitioner, it is respectfully submitted that such a regulation is arbitrary and unreasonable and repugnant to the principles of fair and just treatment by the government of its citizens.

Furthermore, this Court said in Morrill v. Jones (106 U. S. 466, 467; 27 L. ed. 267):

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

If the Secretary of the Treasury cannot "alter or amend a revenue law," certainly no other official of the Treasury Department can do so. Neither can the provision of a revenue law be extended by implication or by a regulation based on implication. In *United States* v. *Merriam* (263 U. S. 187, 8; 68 L. ed. 244), this Court said:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53."

In view of the great public importance of the attempt by the Commissioner of Internal Revenue to assume the authority exercised by him in Article 8 of his said Regulations (*supra*), in regard to the method and character of proof necessary for petitioner to pass the beverage tax on its soft drinks on to the purchasers thereof, it is respectfully submitted that the decision of the lower Court herein should be reviewed by this Court and certiorari granted herein as prayed.

CONCLUSION

In view of all of the foregoing, it is respectfully submitted that the case at bar is one in which this Honorable Court may with great propriety grant a writ of certiorari, and it is respectfully so urged to do.

LASH'S PRODUCTS COMPANY,

By A. R. SERVEN,
Counsel.

DANIEL R. FORBES,
RICHARD D. DANIELS,
Of Counsel.

Office Supreme Court, U.
FILED
OCT 11 1928
CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

October Term, 1928

No. 98

Lash's Products Company, Petitioner,

vs

The United States

BRIEF FOR PETITIONER

A. R. SERVEN,
Attorney for Petitioner.

DANIEL R. FORBES,
RICHARD D. DANIELS,
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PRESS OF FRANC E. SHERMY, 908 12TH STREET NORTHWEST

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 98

Lash's Products Company, Petitioner,

vs

The United States

BRIEF FOR PETITIONER

HISTORY AND JURISDICTION

This case arises under the Revenue Act of 1918 (R. p. 13; Finding IV). The opinion of the United States Court of Claims in this case has not yet been officially reported. The judgment of the Court below was entered November 7, 1927 (R. pp. 16-17). Motion for new trial was overruled January 23, 1928 (R. p. 17). The Writ of Certiorari was granted herein May 28, 1928.

Petitioner claimed in the Court below that it was required by law to pay the beverage sales tax on only

10/11ths of the amounts it received from its purchasers, which included the price of its products and also the 10 per centum beverage tax thereon, while the Court below held that it was required to pay the 10 per centum beverage sales tax upon the entire amount received by it from its purchasers (R. pp. 7-8; Section VII Amended Petition; Opinion of Court, R. p. 16, Second Paragraph; Judgment of Court, R. pp. 16-17).

The jurisdiction is invoked under Chapter 229, Section 3 (b) of "An Act to Amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals, and of the Supreme Court, and for other purposes," approved February 13, 1925 (43 Stat. L. 939). The jurisdiction of this Court is sustained by its opinions in the following cases:

Forsyth v. *Hammond* (366 U. S. 506; 41 L. ed. 1095);
Fields v. *United States* (205 U. S. 292; 51 L. ed. 807);
Hamilton Brown Shoe Co. v. *Wolf Bros. Co.* (240 U. S. 251; 60 L. ed. 629);
Magnum Import Company v. *Coty* (262 U. S. 159; 67 L. ed. 922).

STATEMENT OF THE CASE

Prior to 1919, Petitioner was engaged in the manufacture of cordials, syrups, and laxative medicinal preparations (R. p. 12; Finding I).

In June, 1919, it began the manufacture and sale of soft drink products at wholesale, which were sold direct by its salesmen, who called upon the purchasers

and told them that the prices quoted for these soft drinks included the beverage sales tax of 10 per centum, which Petitioner was required by statute to report and pay. Petitioner also notified the purchasers by letter under date of June 28, 1919, to the same effect (R. pp. 12-13; Finding III).

During the period involved in this case, Petitioner received $2,475,031.44 from its soft drink sales at the prices quoted therefor, which included the beverage sales tax and reported said sales and paid as tax thereon $247,503.16, under the presumed requirements of the Revenue Act of 1918 (R. pp. 12-13; Findings III, IV). These soft drinks were billed or invoiced to the purchaser without separate itemization or indication of the price of the goods and also the amount of the beverage sales tax thereon (R. p. 13; Finding IV).

Petitioner duly filed refunding claims with the Commissioner of Internal Revenue for $22,500.33, claimed to have been erroneously computed and overpaid by it as beverage sales tax on said sales, which claims were disallowed by said Commissioner on the ground that Petitioner "did not indicate the tax in such a way as not to be a part of and included in the price," for which the product was sold (R. p. 14; Finding V). Thereafter, Petitioner brought suit in the Court of Claims for said amount, on the ground that it had paid a 10 per centum beverage sales tax on the entire amount received from its purchasers of soft drinks, which included said 10 per centum beverage sales tax, instead of on the actual price it received for the soft drinks "so sold" (R. pp. 7-8; Section VII, Amended Petition). This petition was dismissed by said Court (R. pp. 16-17).

Assignment of Errors To Be Urged

1. The Court erred in holding that the tax must be paid upon the total amount received from the purchasers of Petitioner's soft drinks.

2. The Court erred in holding that it was legally necessary for Petitioner's bills or invoices for soft drinks to separately show or indicate both the amount Petitioner was to receive for its soft drinks and the tax thereon, in order to enable Petitioner to pass this tax on to the purchasers.

3. The Court erred in holding that the Commissioner of Internal Revenue can, by regulation, deprive Petitioner of its right to show the true price for which its goods were sold, and thereby increase the statutory rate of the beverage sales tax from 10 to 11 per centum of the price it actually received for its soft drinks, because Petitioner's bills or invoices did not separately itemize or indicate both the price of the goods "so sold" and the amount of the sales tax thereon.

ARGUMENT

The Law and Pertinent Facts

This case arises under the provisions of Sections 628 and 629 of the 1918 Revenue Act (40 Stat. L. 1116), which are as follows:

> "Sec. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by sections 313 and 315 of the Revenue Act of 1917—
>
> "(a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of

alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and

"(b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon.

"Sec. 629. That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

"The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due."

As shown by Finding I, prior to June, 1919, Petitioner was engaged in the manufacture and wholesal-

ing of cordials, syrups, and laxative medicinal preparations.

As shown by Finding III, in June, 1919, Petitioner began the manufacture and sale of soft drinks to the retail trade. Its sales were made direct by salesmen, who called upon the purchasers and informed them its prices for soft drings included the 10 per centum beverage sales tax thereon, which it would pay as required by the statute.

As shown by Finding IV, Petitioner's invoices for soft drinks were not itemized so as to separately show or indicate the amount of the tax included therein, and that Petitioner reported and paid as such beverage sales tax a sum equal to 10 per centum of the total amount it received from the purchasers of its soft drinks during the period covered by this case.

As shown by Finding V, Petitioner duly filed its refunding claims for the amount herein sued for, which were disallowed on the ground that Petitioner did not indicate the tax in such a way as not to be a part of and included in the price for which its soft drinks were sold.

Errors in Court Below

1. The Court erred in holding that the tax must be paid upon the total amount received from the purchasers of Petitioner's soft drinks.

From the foregoing facts, it will be seen that Petitioner's customers must have understood when they bought its soft drinks they not only had to pay for the soft drinks, but also the 10 per centum tax thereon. Therefore, it is obvious that Petitioner intended to pass this 10 per centum beverage sales tax on to its

purchasers when it contracted with them that the prices they paid for its soft drinks would include this tax.

The beverage sales tax is one of those taxes that may be passed on to the purchaser. This seems to be clearly recognized by the provisions of Section 1312 of the 1918 Revenue Act, and is also frankly admitted by Treasury Regulations No. 52, relating to the administration of Sections 628 and 629 of that Act, and in the Commissioner's interpretation in January, 1921, of Article 8 of these Regulations. This article is as follows:

> "Art. 8. *Basis for tax; sale price.*—The tax is on the sale by the manufacturer of the beverage. It is measured by the price for which the beverage is sold. It is on the actual sales price of the beverage sold and not on the list price where that differs from the sales price. If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price, but where the tax is billed as a separate item it is not to be considered as an increase in the sale price. The tax is payable in respect to a sale made whether or not the purchase price is actually collected."

The Commissioner's interpretation of this article is as follows:

> "Article 8 of Regulations 52 provides that the tax is measured by the price for which the beverage is sold by the manufacturer and that if the price of the beverage is increased to cover the tax the tax is on such increased price which includes the amount added by the manufacturer to cover the tax.

"On the other hand, if the price is not increased to cover the tax, but the manufacturer quotes the price of the beverage and the amount of the tax as separate items and in the exact amounts represented by such items, and, in the event bills or invoices are rendered, shows the items separate therein, the tax does not attach to the amount representing tax on the selling price of the product.

"In other words, the theory of the regulations is that the tax is on the price for which the manufacturer sells his product at the time and place where he sells it; that this price must be clearly indicated in quotations and invoices, but that if other items, such as transportation expenses or tax are included in the selling price without segregation, the tax must be based on the total selling price including such other items. It is not sufficient for the purpose of current returns that the books or records of the manufacturer show the different items entering into the selling price, if the purchaser is not fully informed by quotation in advance of the sale, and by the invoice for the goods, when such invoice is made, of the different items entering into the quoted or invoiced price." (Sales Tax Rulings, Cumulative Bulletin, Nos. 113-265; January-June, 1921, pp. 27-9.)

Neither the Revenue Act of 1918 nor the Regulations of the Commissioner of Internal Revenue issued thereunder contemplate that taxes imposed on the price for which goods were sold by manufacturers should be borne by the manufacturer. Sec. 1312 of the Act specifically provides that in all cases where there were in existence contracts between manufacturers and dealers for the sale of articles so taxed by the Act, but which did not permit the adding to the amounts to be paid under the contract of the whole of the tax

imposed, the vendee, in lieu of the vendor, should pay so much of the tax imposed by the Act as was not permitted to be added to the contract price, and that the tax so paid by the vendee should be collected by the vendor at the time sales were consummated and returned by the vendor to the United States.

In addition to the Commissioner's said interpretation of Article 8 of his Regulations 52, Regulations 47, revised December 1920, well illustrates the interpretation placed upon the taxes imposed on sales by Section 900 of the Act of 1918, and authorizes the exclusion of the tax from the price of the articles in computing tax under the following conditions:

(a) By quoting the selling price and the tax in separate and exact amounts, and where invoices are rendered by segregating these amounts on invoices.

(b) By stating to the purchaser in advance of sale what portion of the quoted price represents the price charged for the article and what portion represents tax, and where invoices are rendered in the following manner:

> *Example 2.* A, the manufacturer, quotes a selling price of $1.05, stating that the price included a tax of 5 cents and bills the goods to B as
>
> "Article No. 1, selling price $1.05, 5 cents of the total represents tax," or
>
> *Example 3.* A, the manufacturer, quotes a selling price of $1.05, stating that 1/21st of the price represents the tax and bills the goods to B as
>
> "Article No. 1, selling price $1.05, 1/21st of the total represents tax."

To the extent that these regulations excluded the tax from the price in computing the tax upon sales

the regulations are in harmony with the provisions of Sec. 1312, and manifest the recognition by the Commissioner that the true basis of the tax on the price for which goods are sold is the actual return to the manufacturer, and not the amount of such return plus tax.

The Commissioner excludes the amount of the tax from the price before computation of tax, where no invoices were rendered, merely upon it being stated to the purchaser in advance of the sale what portion of the quoted price represented the price charged for the article and what portion represented the tax; but where invoices were used the Regulations make the exclusion of the tax dependent upon the manufacturer inscribing upon the invoice a prescribed form of statement that the price includes a definite amount or proportion on account of the tax. Obviously, when the tax was included in the amount charged to the vendee the amount realized from the sale or the vendor's actual selling price was the same whether or not the articles were subsequently invoiced by the vendor, or, if invoiced, whether or not the invoice bore a notation that so many cents or a specified percentage of the total represented the tax.

The Regulations evidently intend that the taxes should be paid by the vendee and imposes upon the manufacturer, or at least, upon those sufficiently familiar with their terms, the sole obligation of collecting the tax from the vendee. It is certain that the Commissioner, in announcing to manufacturers his methods for collecting the tax from their vendees, did not expect the manufacturer to bear the burden of it.

In *American Express Company* v. *Michigan* (177

U. S. 404; 44 L. ed. 823) it was argued that the burden of the tax there involved could not be passed on to the shipper, or purchaser, of the services furnished by the company. However, this Court in very forceful language refused to concur in that argument and upheld the action of the company in requiring its customers to pay the tax and, among other things, the Court holds, at page 410:

> "On the contrary, if the right to seek to shift the burden obtains, then the substantial result of what is done becomes the criterion, and the mere fact that the motive, announced, for a reasonable increase of rates, is declared to be a shifting of the burden, cannot prevent the exercise of the lawful right."

At page 412 the Court holds:

> "In other words, the contention comes to this, that the act in question is not alone a law levying taxes and providing the means for collecting them, but is moreover a statute determining that the burden must irrevocably continue to be upon the one on whom it is primarily placed. The result follows that all contracts or acts shifting the burden, and which would be otherwise valid, become void. To add by implication such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes is naturally presumed to effectuate. Indeed, it seems almost impossible to suppose that a purpose of such a character could have been contemplated, as the widest conjecture would not be adequate to foreshadow the far-reaching consequences which would ensue from it. To declare upon what person or property all taxes must primarily fall is a usual purpose of a law levying

taxes. To say when and how the ultimate burden of a tax shall be distributed among all the members of society would necessitate taking into view every possible contract which can be made, and would compel the weighing of the final influence of every conceivable dealing between man and man. A tax rests upon real estate. Can it be said by the law imposing such a tax it was intended to prevent the owners of real property from taking into consideration the amount of a tax thereon, in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold, and restrain the merchant, therefore from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burdens of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on if adopted would control almost every conceivable form of contract, and render them void if they had the result stated. Thus, the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes, if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result. It cannot be doubted that to adopt, by implication, the view pressed upon us, would be to virtually destroy all freedom of contract, and in its final analyses would deny the existence of all rights of property."

In consideration of the foregoing, it would therefore appear that when Petitioner contracted with its purchasers, as shown by Finding III, that they should pay the beverage sales tax as a part of the price of the soft drinks they purchased from the Petitioner, it thereby legally effected a shifting of the burden of

this tax to its said purchasers.

As Petitioner was without experience in the computation of the sales tax until June, 1919, when it began its soft drink business, we think it must be reasonably assumed when the time arrived to compute and pay this tax on its soft drink sales of that month that it consulted the proper representatives of the Defendant and followed their instructions in determining the amount of sales tax it should pay, and that it continued this same method of computation for the entire period involved herein.

Nevertheless, it must be remembered that when Petitioner had finally considered the matter it decided that it had overpaid the amount of this tax, which was legally due from it and, therefore, as shown by Finding V, filed its refunding claims in the amount herein sued for, which were disallowed, because Petitioner had not itemized in its bills or invoices the gross price received for its soft drinks so as to separately show the amount of the tax and the amount it was to receive for its soft drinks.

In view of the contracts, as shown by Finding III, under which its customers purchased these soft drinks, it is respectfully submitted that the sales tax thereon was legally passed on to the purchasers, notwithstanding the provisions of Article 8 of the Commissioner's Regulations 52, and his interpretation thereof, and that the Court below erred in holding that the tax must be paid upon the total amount received from the purchasers of its soft drinks.

2. The Court erred in holding that it was legally necessary for Petitioner's bills or invoices for soft drinks to separately show or indicate both the amount Petitioner was to receive for its soft drinks and the

tax thereon, in order to enable Petitioner to pass this tax on to the purchasers.

The Court below seems to have misapprehended the facts to some extent in regard to Petitioner's soft drink business, as the second sentence of its opinion states that:

> "Sales were made to the retail trade, who were informed by the salesmen that the price of Plaintiff's product would not be increased on account of the beverage tax imposed by the revenue act of 1918, but that the price would remain the same as before the act was passed" (R. p. 15).

As Finding III shows Petitioner did not begin its manufacture and sale of soft drinks until June, 1919, although the Revenue Act of 1918 was approved February 24, 1919, and as there is no finding of fact in support of the Court's declaration just quoted, this statement in its opinion seems to be without foundation.

It should be noted here that bills or invoices do not possess the character of contracts. At best, they are merely memoranda of certain transactions occurring within the provisions of the contracts under which they arise. Certainly, the actual contract, and not a memorandum referring to it, should be the criterion to determine whether or not the Petitioner legally shifted the burden of this tax to its purchasers, so that the price for which its soft drinks were actually sold under these contracts was only 10/11th of the amount it received from said purchasers. In other words, Article 8 of the Commissioner's Regulations and his interpretation of that Article rest upon mere form rather than substance. The contents of the bill or invoice cer-

tainly should not be held to override the specific provisions of the contracts under which Petitioner sold soft drinks to the purchasers and thereby determine what amount of beverage sales tax it was legally required to pay. It would also seem that the information Petitioner gave its purchasers that the price of its soft drinks included the 10 per centum beverage sales tax thereon constituted all the notice of that fact that could reasonably be required and, therefore, the giving of such information in advance of the sales should be held to amount to a satisfactory compliance with the intent and meaning of the Regulation.

The identical questions here involved were very carefully considered by Judge Brewster in *Clicquot Club* v. *United States* (13 Fed. (2nd) 655, which was not appealed), where it was held that the beverage sales tax accrued upon 10/11th of the amount received from its purchasers, rather than the total amount thereof, which included the beverage sales tax, although, as in the case at bar, the bills or invoices did not separately show or indicate the amount of such tax.

The Court's attention is also invited to the opinion of the United States Circuit Court of Appeals in *Elmer Candy Company* v. *Fauntleroy* (24 Fed. (2nd) 95; Adv. Op.), where similar questions were considered, and the Court held:

> "Apparently the only thing that could prevent a recovery in this case is the technicality regarding the manner of rendering invoices. We think what was done by Plaintiff in notifying its customers that the price would include the tax comes within the meaning and intent of clause B above quoted, and that, Plaintiff having in effect stated to the purchasers in quoting prices what portion

> represented the prices charged for the article and what portion represented the tax, the technicality should be disregarded."

In consideration of the foregoing, it is respectfully submitted that the Court below erred in holding that it was legally necessary for Petitioner's bills or invoices for soft drinks to separately show or indicate both the amount Petitioner was to receive for its soft drinks and the tax thereon, in order to enable Petitioner to pass this tax on to the purchasers.

3. The Court erred in holding that the Commissioner of Internal Revenue can, by regulation, deprive Petitioner of its right to show the true price for which its goods were sold, and thereby increase the statutory rate of the beverage sales tax from 10 to 11 per centum of the price it actually received for its soft drinks, because Petitioner's bills or invoices did not separately itemize or indicate both the price of the goods "so sold" and the amount of the sales tax thereon.

The Commissioner's authority to make regulations for the administration of this beverage sales tax is contained in Section 1309 of the Revenue Act of 1918, which, so far as pertinent, is as follows:

> "That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act."

The question, therefore, arises whether it was "needful" for the administration of this tax that Petitioner, and other taxpayers subject thereto, should be limited to statements made in their bills or invoices, in order to determine the actual price for which their soft

drinks were sold, and whether or not they had shifted the burden of this tax on to the purchasers.

It is beyond reasonable doubt that the terms of the contracts under which the soft drinks were sold furnished the best evidence of the actual price for which they were "so sold" and for determining whether the burden of this tax had been shifted to the purchasers. In discussing a somewhat similar technical regulation, this Court, in *Waite* v. *Macy*, (246 U. S. 606), at page 610, held that:

> "The Secretary and the board must keep within the statute (*Merritt* v. *Welsh*, 104 U. S. 694, 26 L. Ed. 896), which goes to their jurisdiction, * * *"

Therefore, as there seems to be no need for the regulation limiting the proof of these facts to the statements in the bills or invoices for the soft drinks sold, and as the statute contains no authority whatever for any such limitation, the regulation in this respect does not appear to be supported by any appropriate authority of law, and should, therefore, be held null and void, in so far as it prescribes that the contents of the bills or invoices shall determine the actual selling price of the soft drinks "so sold," rather than the actual contract of sale.

The regulation in this respect is also objectional for the reason that it is an attempt to extend the provisions of the law so as to make the contents of bills or invoices the sole evidence from which to determine the actual price for which Petitioner's goods were "so sold," and to exclude from consideration all other evidence of the true selling price. If Congress had

intended to place any such limitation upon the evidence by which to determine the actual price for which soft drinks were "so sold," it would have expressed that intention in appropriate language. As no such language is contained in the statute, this is proof positive that it had no such intention. This Court, in *Morrill* v. *Jones* (106 U. S. 466, 27 L. Ed. 267), denied the right of administrative officers to make such regulations when it held, at page 467, that—

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

For this reason also, the regulation, in so far as it attempts to limit the evidence from which to determine the actual price for which petitioner's soft drinks were "so sold," should be held null and void.

The regulation in this respect is also objectionable because it discriminates between taxpayers who notified the purchasers in advance that the prices of its soft drinks included the tax, by permitting those who separately showed or indicated the amount of the tax in their bills or invoices to shift its burden to the purchasers, while those whose bills or invoices did not show or indicate the tax were denied this right, with the result that, in effect, the Commissioner required the latter to pay the tax at the rate of 11 per centum while permitting the former to pay at the rate of 10 per centum. Also where bills or invoices were not used, the manufacturer who quoted a price including the tax and also separately stated the amount he re-

ceived for his goods and the amount of the tax thereon is permitted to pass the tax on to the purchasers, while the manufacturer who informed his purchasers that the price he quoted also included the tax was denied this right. It is submitted that it was not the intention or purpose of Congress to permit any such discrimination.

Because the regulation thus discriminates between taxpayers in these respects and violates the rule of equality in taxation, it should be held null and void.

The regulation is still further objectionable because by thus discriminating between taxpayers it, in effect, increased the statutory rate for such taxpayers as did not show or indicate the amount of the tax in their bills or invoices from the statutory rate of 10 to 11 per centum of the actual price for which their goods were "so sold," as in the case at bar. In *United States* v. *United Verde Copper Company* (196 U. S. 207; 49 L. Ed. 449) this Court held at page 215 that—

> "If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation: it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

Because the effect of the regulation thus increases the tax rate of this petitioner from 10 to 11 per centum without any legal authority whatever therefor, the regulation in this respect should be held null and void.

The regulation is still further objectionable because it violates the well settled rule for the construction of taxing statutes that where any ambiguity exists the

doubt should be resolved in favor of the taxpayer. Evidently this provision of the Commissioner's regulation is based upon the assumption by him that there is ambiguity in the statute as to the determination of the actual price for which the soft drinks were "so sold." This Court, in *United States* v. *Merriam* (263 U. S. 187-8; 68 L. ed. 244), held as follows:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151; 62 L. ed. 211, 213; 38 Sup. Ct. Rep. 53."

For this reason, the regulation in this respect should be held null and void.

The regulation in this respect is still further ojectionable, because, as plainly appears from the foregoing, it is arbitrary and unreasonable and repugnant to the principles of fair and just treatment of its citizens by the Government, unless it be held that Petitioner's notice to the purchasers of its soft drinks that its price would include the beverage sales tax thereon was a satisfactory compliance with the intent and meaning of the Commissioner's regulation.

Therefore, unless it be so held, the regulation in this respect should be held null and void.

For all of the reasons stated, it is therefore respectfully submitted that the Court erred in holding that

the Commissioner of Internal Revenue can, by regulation, deprive Petitioner of its right to show the true price for which its goods were sold, and thereby, in effect, increase the statutory rate of the beverage sales tax from 10 to 11 per centum of the price it actually received for its soft drinks, because Petitioner's bills or invoices did not separately itemize or indicate both the price of the goods so sold and the amount of the sales tax thereon.

CONCLUSION

In consideration of the reasons hereinbefore set forth, and especially in view of the fact that Petitioner's salesmen personally called upon its customers and notified them that the gross price charged for its soft drinks included both the amount Petitioner was to receive in compensation for its merchandise and the 10 per centum beverage sales tax thereon, in advance of the sale of the merchandise and before bills or invoices could issue therefor, it is respectfully submitted that the decision of the Court below should be reversed and that Petitioner should have judgment for $22,500.33, with interest thereon as provided by law.

Respectfully submitted,

A. R. Serven,
Attorney for Petitioner.

Daniel R. Forbes,
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Of Counsel.

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103822—28

In the Supreme Court of the United States

OCTOBER TERM 1927

No. 858

LASH'S PRODUCTS COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 15–16) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered November 7, 1927. (R. 16.) A motion for a new trial was overruled on January 23, 1928. (R. 17.) Petition for writ of certiorari was filed March 24, 1928. (R. 17.) Jurisdiction of this Court to issue the writ is found in Section 3 (b) of the Act of February 13, 1925.

THE QUESTION

Does the payment of an excise tax imposed upon the manufacture and sale of soft drinks decrease the selling price of the beverages by the amount of the tax and make such decreased amount the measure of the tax?

THE STATUTES

Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1116):

> SEC. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by sections 313 and 315 of the Revenue Act of 1917—
>
> (a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and
>
> (b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed

containers, at over 10 cents per gallon, a tax of 2 cents per gallon.

SEC. 629. That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

THE REGULATIONS

Regulations 52:

ART. 8. *Basis for tax: sale price.*—The tax is on the sale by the manufacturer of the beverage. It is measured by the price for which the beverage is sold. It is on the actual sales price of the beverage sold and not on the list price where that differs from the

> sales price. If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price, but where the tax is billed as a separate item it is not to be considered as an increase in the sales price. The tax is payable in respect to a sale made whether or not the purchase price is actually collected.

STATEMENT

The petitioner, a California corporation (R. 12), during the period June, 1919, to December, 1921, manufactured and sold certain soft drinks, or beverages (R. 13, 14). Orders for the sale of the said beverages were obtained by petitioner's salesmen who called upon the customers for that purpose. In quoting prices on the beverages, petitioner's salesmen advised the customers that the said prices included the tax which would be paid by the petitioner. (R. 12.) Petitioner also advised the trade by letters dated June 28, 1919, of the prices of its various beverages, and in said letters notified the trade as follows (R. 13):

> You will please note that *we pay the tax* on our non-intoxicating goods—which amounts to 10%— and as they sell at 10¢ or more per drink, it leaves a nice margin of profit for you. (Italics ours.)

During the period June, 1919, to December, 1921, petitioner sold to its customers soft drinks having an aggregate selling price of $2,475,031.44. The

invoices rendered to the customers were not itemized so as to show any tax, but indicated the amount billed as the price of the beverages. Said amounts were paid by the customers to the petitioner. (R. 13.)

Petitioner reported monthly to the Bureau of Internal Revenue, on proper returns, the amounts received by it on account of said sales, and paid, during the period aforesaid, taxes aggregating $247,503.16, which represented 10% of the amount so received. (R. 13.)

Claims for the refund of $22,500.33 of the said tax were filed by the petitioner on the ground that the "price" of its products included the 10% tax, and therefore the actual selling price was not the amounts billed to and received from the customers but was those amounts less the tax. Said claims were rejected by the Commissioner of Internal Revenue and this suit presents the question to this Court. (R. 14.)

ARGUMENT

The question in this case is like that in No. 949, *Fauntelroy, Collector,* v. *Elmer Candy Co.*, pending on petition for certiorari filed by a Collector of Internal Revenue to review a judgment of the Circuit Court of Appeals for the Fifth Circuit. The principal ground for our petition in that case was the conflict between the decision there and that

of the Court of Claims in this case. We can not consistently oppose this petition.

Respectfully submitted.

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Attorney.

MAY, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 98

LASH'S PRODUCTS COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 15–16) is reported in 64 Ct. Cls. 252.

JURISDICTION

The judgment sought to be reviewed was entered November 7, 1927. (R. 16.) A motion for a new trial was overruled on January 23, 1928. (R. 17.) Petition for writ of certiorari was filed March 24, 1928. (R. 17.) Certiorari was granted May 28, 1928. (R. 18.) Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

Sections 628 and 629 of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1116), impose upon soft drinks sold by the manufacturer, producer, or importer a tax, to be paid by the manufacturer, producer, or importer measured by "the price for which so sold." The question presented is whether, in a case where the manufacturer advised its customers that its prices included the tax, which would be paid by the manufacturer, but the invoices rendered to the customers were not itemized so as to show any tax, "the price for which so sold," within the meaning of the statute, is the total amount received by the manufacturer or such amount decreased by the amount of the tax.

THE STATUTE

The applicable portion of the Revenue Act of 1918 is as follows:

> SEC. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by sections 313 and 315 of the Revenue Act of 1917—
>
> (a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale,

root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and

(b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon.

SEC. 629. That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Other sections of the Revenue Act of 1918, which tend to throw light on the proper interpretation of Sections 628 and 629, are set forth in appendices.

THE REGULATIONS

Regulations 52, issued May 3, 1919, contains the following:

> ART. 8. *Basis for tax: sale price.*—The tax is on the sale by the manufacturer of the beverage. It is measured by the price for which the beverage is sold. It is on the actual sales price of the beverage sold and not on the list price where that differs from the sales price. If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price, but where the tax is billed as a separate item it is not to be considered as an increase in the sales price. The tax is payable in respect to a sale made whether or not the purchase price is actually collected.

The interpretation placed by the Bureau of Internal Revenue upon this regulation is shown by a ruling contained in Sales Tax Rulings, Internal Revenue Bureau Cumulative Bulletin January-June, 1921, page 27, as follows:

> The interpretation which the Bureau places upon the regulations with respect to the basis of the tax under section 628 of the Revenue Act of 1918 is as follows:
>
> * * * * *
>
> Article 8 of Regulations 52 provides that the tax is measured by the price for which

the beverage is sold by the manufacturer and that if the price of the beverage is increased to cover the tax the tax is on such increased price which includes the amount added by the manufacturer to cover the tax.

On the other hand, if the price is not increased to cover the tax, but the manufacturer quotes the price of the beverage and the amount of the tax as separate items and in the exact amounts represented by such items, and, in the event bills or invoices are rendered, shows the items separately therein, the tax does not attach to the amount representing tax on the selling price of the product.

In other words, the theory of the regulations is that the tax is on the price for which the manufacturer sells his product at the time and place where he sells it; that this price must be clearly indicated in quotations and invoices, but that if other items, such as transportation expenses or tax are included in the selling price without segregation, the tax must be based on the total selling price including such other items. It is not sufficient for the purpose of current returns that the books or records of the manufacturer show the different items entering into the selling price, if the purchaser is not fully informed by quotation in advance of the sale, and by the invoice for the goods, when such invoice is made, of the different items entering into the quoted or invoiced price.

STATEMENT

The petitioner, a California corporation (R. 12), during the period from June, 1919, to December, 1921, manufactured and sold certain soft drinks or beverages (R. 13, 14). Orders for the sale of the said beverages were obtained by petitioner's salesmen who called upon the customers for that purpose. In quoting prices on the beverages petitioner's salesmen advised the customers that the said prices included the sales tax, which would be paid by the petitioner. (R. 12.) Petitioner also advised the trade by letters dated June 28, 1919, of the prices of its various beverages, and in said letters notified the trade as follows (R. 13):

> You will please note that we pay the tax on our nonintoxicating goods—which amounts to 10%—and as they sell at 10¢ or more per drink, it leaves a nice margin of profit for you.

During the period June, 1919, to December, 1921, petitioner sold to its customers soft drinks having an aggregate selling price of $2,475,031.44. The invoices rendered to the customers were not itemized so as to show any tax, but indicated the amount billed as the price of the beverages. Said amounts were paid by the customers to the petitioner. (R. 13.)

Petitioner reported monthly to the Bureau of Internal Revenue, on proper returns, the amounts received by it on account of said sales, and paid,

during the period aforesaid, taxes aggregating $247,503.16, which represented 10% of the amount so received. (R. 13.)

Claims for the refund of $22,500.33 of the said tax were filed by the petitioner on the ground that the "price" of its products included the 10% tax, and therefore the actual selling price was not the amount billed to and received from the customer but was that amount less the tax. The claims were rejected by the Commissioner of Internal Revenue on the ground that the petitioner "did not indicate the tax in such a way as not to be a part of and included in the price" for which the product was sold. (R. 14.) This suit resulted. The Court of Claims held that the petitioner was not entitled to recover. (R. 14–17.)

SUMMARY OF ARGUMENT

The tax imposed by Sections 628 and 629 of the Revenue Act of 1918 is a tax upon the manufacturer, producer, or importer and no liability or obligation with respect to the tax is imposed upon the purchaser. This is clear both from the provisions of the sections themselves and from a comparison of the sections with other provisions of the Act. Two kinds of taxes based on sales were provided for by the Act. The first kind, in which the tax imposed by Sections 628 and 629 is included, is a tax upon the seller measured by the *selling price*. The second kind is a tax upon the purchaser measured by the *amount paid*, and the seller is merely constituted a

collecting agency, charged with the duty of receiving the tax from the purchaser and paying it over to the Government. Throughout the Act Congress used language which clearly distinguished between these two kinds of taxes.

Giving the words their ordinary meaning, the price for which an article is sold is the total amount which the vendor receives for it. The theory of Article 8 of Regulations 52, however, is that by billing the tax separately a vendor may divide the amount received by him into two items, one representing selling price and the other representing tax. This presupposes that the tax as a tax may be passed on to the purchaser, a theory which seems to us very doubtful in view of the fact that no matter what the agreement between the vendor and purchaser may be, the liability for the tax under the Revenue Act of 1918 still rests upon the vendor and the purchaser is under no duty or liability to the Government with respect thereto.

The effect of the regulation was to adopt a different base for the computation of the tax than that specified in the statute.

The Commissioner has always construed the words "the price for which so sold" in Section 628 of the Revenue Act of 1918 and other similar sections of that and subsequent Acts as being the total amount received if the tax is not quoted and billed separately and as being that amount less the tax if the tax is quoted and billed separately. The tax imposed by Section 628 was not continued in subse-

quent Revenue Acts, but other similar taxes were continued without substantial change of language in such Acts. It is arguable, therefore, that Congress has approved and ratified the Commissioner's construction of the words "the price for which so sold."

Whether or not Article 8 of Regulations 52 is valid the petitioner can not succeed. If the regulation is invalid, there is no provision for passing on the tax, as such, to the purchaser, and the total amount received by the seller must represent the selling price on which the tax is computed. On the other hand, if the regulation is valid because of Congressional ratification, this applies equally to all portions of the regulation; and if the provision permitting the tax to be passed on is valid, so must be the requirement of separate billing in order to accomplish this. The petitioner did not comply with the requirement and has no right to complain.

Cases in the lower Federal courts involving claims similar to that of the petitioner in this case are about evenly divided upon the question whether or not the taxpayer should recover.

ARGUMENT

I

THE TAX IMPOSED BY SECTIONS 628 AND 629 OF THE REVENUE ACT OF 1918 IS A TAX UPON THE MANUFACTURER, PRODUCER, OR IMPORTER

Section 628 of the Revenue Act of 1918 provides that there shall be levied, assessed, collected, and paid:

> upon all * * * soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; * * *

And Section 629 provides:

> That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section * * *.

Clearly this is a tax upon the manufacturer-producer, or importer. There is nothing in the statute which imposes upon the purchaser any liability or obligation with respect to the tax.

Sections 628 and 629 seem clear and unambiguous and further argument in support of the view that the tax is imposed upon the manufacturer, producer, or importer is perhaps unnecessary. However, other provisions of the Revenue Act of 1918 demonstrate beyond doubt that this view is correct. Two kinds of taxes based on sales were provided for by the Act. The first kind, in which the tax imposed by Section 628 is included, is a tax upon the seller measured by the *selling price*. The second kind is a tax upon the purchaser measured by the *amount paid*, and the seller is merely constituted a collecting agency, charged with the duty of receiving the tax from the purchaser and paying it over to the Government. In the former

class are the excise taxes imposed by Section 900 upon a long list of articles of miscellaneous character "sold or leased by the manufacturer, producer, or importer," the tax imposed by Section 902 upon works of art "sold by any person other than the artist," and the tax imposed by Section 905 upon jewelry "when sold by or for a dealer or his estate for consumption or use." The provisions of the statute showing the nature of these taxes are set forth in Appendix A.

In the class of taxes imposed upon the purchaser and measured by the amount paid are the tax imposed by Section 500 on "the amount paid for" transportation and other facilities, the normal taxes imposed by Sections 800 and 801 upon amounts paid for admissions or dues (although additional taxes imposed on sales at places other than the box office, on sales at amounts in excess of regular rates, etc., are imposed upon the seller), the tax imposed by Section 904 measured by "so much of the amount paid for any of the following articles as is in excess of the price hereinafter specified as to each such article," the articles in question being various articles of clothing, furnishings, etc., and the tax imposed by Section 907 measured by the amount paid for toilet articles, proprietary medicines, etc. The provisions of the statute showing the nature of these taxes are set forth in Appendix B.

It appears from the provisions referred to above that in every case in which the seller was made

liable for the tax the phrase employed by Congress to fix the measure of the tax was "the price for which so sold," and in providing for the payment of the tax language appropriate to making it payable by the seller was used. On the other hand, when the tax was laid on the purchaser, Congress not only so stated in plain, unmistakable terms, but in addition each time used the phrase "the amount paid" to indicate the measure of the tax, and each time set forth the method by which the tax should be collected by the vendor.

Section 1312 of the Revenue Act of 1918 was designed to protect vendors who had previously entered into bona fide contracts which did not permit adding to the amount to be paid thereunder the tax, or the increase in tax, provided for by certain sections of the Act, including Section 628. It provides that in such cases under certain circumstances the tax, or the increase in tax, shall be paid by the vendee in lieu of the vendor, and that:

> (4) The taxes payable by the vendee or lessee under this section shall be paid to the vendor or lessor at the time the sale or lease is consummated, and collected, returned, and paid to the United States by such vendor or lessor in the same manner as provided in section 502.

Section 502 is the section dealing with the collection of the transportation tax by the vendor and is set forth in Appendix B of this brief. Section 1312 is set forth in full in Appendix C.

The fact that Congress thought it necessary in order to protect vendors who could not protect themselves from the taxes by raising their prices, to adopt Section 1312 and impose the taxes upon vendees in such cases, necessarily shows that the taxes in question were imposed upon vendors and not upon vendees in cases not within the scope of the section.

II

THE AUTHORITY OF THE COMMISSIONER OF INTERNAL REVENUE TO ADOPT ARTICLE 8 OF REGULATIONS 52 IS DOUBTFUL. THE REGULATION MAY BE CONSIDERED TO HAVE BEEN CONFIRMED BY CONGRESS, BUT IF SO IT WAS CONFIRMED AS A WHOLE, INCLUDING THE REQUIREMENT FOR SEPARATE BILLING OF THE TAX

Giving the words their ordinary meaning, the price for which an article is sold is the total amount which the vendor receives for it. The theory of Article 8 of Regulations 52, however, is that by billing the tax separately a vendor may divide the amount received by him into two items, one representing selling price and the other representing tax. This presupposes that the tax as a tax may be passed on to the purchaser, a theory which seems to us very doubtful in view of the fact that no matter what the agreement between the vendor and purchaser may be the liability for the tax under the Revenue Act of 1918 still rests upon the vendor, and the purchaser is under no duty or liability to the Government with respect thereto.

The statute treated all that was received by the manufacturer for his goods as the price and the basis for computing his tax. The regulation provided that something less than the price received should be the amount on which the tax should be computed.

Heckman & Co., Inc. v. *I. S. Dawes & Son Co., Inc.*, 12 F. (2d) 154, is in point. In that case it appeared that the Commissioner of Internal Revenue had promulgated a regulation construing Section 628 of the Revenue Act of 1918 as imposing upon manufacturers of cider a tax equal to 10% of the price for which sold. As such a manufacturer the defendant paid to the United States 10% of the price for which its cider was sold. The defendant sold a quantity of cider to the plaintiff and added to the selling price the 10% thus paid to the United States. It was later decided that the Revenue Act of 1918 did not authorize the imposition of a tax on cider, and thereupon the defendant sought and obtained a refund of the cider tax paid by it. The plaintiff sought to recover from the defendant the 10% involved, on the theory that the money refunded to the defendant "constitutes a trust fund for the benefit of the plaintiff to the extent that it represents taxes paid by" the plaintiff to the defendant. The Court of Appeals of the District of Columbia held that the plaintiff was not entitled to recover, saying (p. 155):

> The Revenue Act of 1918, as construed by the Treasury Department, imposed a tax on

> the manufacturer, not the dealer. The defendant, as such manufacturer, paid this tax. In selling to the plaintiff, it added to the selling price the amount of the tax, which plaintiff voluntarily paid in order to continue "dealing in cider," which was a large and profitable portion of its business. Defendant paid no tax for the plaintiff but for itself. The sale to the plaintiff was not induced by misrepresentation as to law or fact, nor was it the result of undue influence on the one side and undue confidence on the other. The payment of this 10 per cent by the plaintiff, therefore, was the result of nothing more than a mistake of law, and such a situation presents no ground for equitable relief.

Wayne County Produce Co. v. *Duffy-Mott Co.*, 244 N. Y. 351, took an opposite view upon facts similar to those in the *Heckman & Co. case*. But it is apparent that the decision is based upon the court's interpretation of the contract between the seller and the buyer, and that the court recognized that the tax was on the [redacted] and that the purchaser had no obligation to the Government with respect thereto, since on page 354 it was said:

> We are asked whether a like remedy would be thought to be available, if the tax were still enforcible and the seller had omitted to make payment to the government. But the situation thus supposed has only a remote analogy to the situation now at hand.

> The buyer has no interest, while the tax is an outstanding liability, in the application of the money. The controversy in such circumstances is solely between taxpayer and government. The buyer's duty would remain to supply the promised funds whereby the seller could discharge a continuing obligation.

In *Elmira Arms Co.* v. *Commissioner of Internal Revenue*, 7 B. T. A. 703, the question was whether the petitioner in determining its taxable income was entitled to deduct excise taxes paid on purchases under Section 900 of the Revenue Act of 1918, the language of which is similar to that of Section 628, in the year in which such purchases were made, whether or not the goods were sold in that year, or was compelled to treat such excise taxes as a part of the cost of the goods allowable as a deduction only when the goods were sold. The Board of Tax Appeals said (pp. 705–706):

> The statute levies an excise tax to be paid as an incident to the sale of the article by the manufacturer. Either directly or indirectly the tax is no doubt included in the price which the purchaser pays but it seems clear that the tax is not one imposed upon the purchaser. There is nothing in the law which requires that it be paid by the purchaser or collected by the manufacturer who sells, and if, through ignorance or misunderstanding of the law or for any other reason, the manufacturer fails to add the tax in computing the selling price, it is he and not the

> purchaser who has incurred liability for its payment. It is our opinion that whether the tax is added directly or indirectly to the price which would otherwise be paid, it constitutes a part of the cost to the purchaser of the articles purchased and is not a tax paid by the purchaser.

In *George M. Cohan* v. *Commissioner of Internal Revenue*, 11 B. T. A. 743, the petitioner claimed deductions from income for so-called luxury taxes on jewelry purchased by him, the taxes in question being imposed by Section 905 of the Revenue Acts of 1918 and 1921, which also is similar to Section 628. After quoting from the section the Board of Tax Appeals said (p. 761):

> It is apparent from this quotation that the taxes are imposed on sales by the dealer and are payable by him, and are not imposed on the purchaser. See *Colgate & Co.* v. *United States*, — Ct. Cls. —, decided February 20, 1928. Such being the case, the petitioner is not entitled to any deduction for any amount which he may have paid the jeweler as a reimbursement for excise taxes. If he paid the jeweler any amount on account of excise taxes (and it is not shown that he did) such payment was a reimbursement to the dealer and not a payment of taxes; it was a demand of the jeweler, not of the sovereign.

It is, of course, not enough to justify the regulation here in question that the burden of the tax will fall on the purchaser in the sense that the price

charged him will undoubtedly reflect the amount of the tax imposed upon the vendor.

Every vendor, if he hopes to remain in business, must fix his prices with a view to his expenses in producing and marketing the article sold, including his real-estate taxes, personal-property taxes, and all other items of expense. But it would hardly be argued that these expenses are therefore expenses of the purchaser, or that the selling price is not the full amount received by the vendor but only that amount less such portion thereof as was included to cover such expenses. And the situation could hardly be changed by the vendor's showing on his invoice what portion of the price is his profit and what portions are calculated to reimburse him for his various items of expense.

We have been unable to learn just what provision of the Revenue Act of 1918 the Commissioner of Internal Revenue relied upon as his authority for the ruling contained in Article 8 of Regulations 52. It has been suggested that Section 1312 led to the ruling in question, it being thought that that section indicated that the tax should be passed on to the purchaser. But while Section 1312 undoubtedly contemplates that the vendor will protect himself from the tax by fixing his prices with the tax in view, and in certain cases in which this is impossible because of a preexisting contract imposes the tax directly upon the purchaser, nevertheless there is absolutely nothing in the section to justify passing on the tax by the vendor to the purchaser.

But while we think the validity of Article 8 of Regulations 52 was extremely doubtful when first adopted, similar rulings in connection with other provisions of the Revenue Act of 1918 have received implied recognition by Congress through reenactment of the provisions without substantial change, and the regulation has been applied for so long that it is too late now to overturn it, but it may be treated as adopted by Congress. See *National Lead Company* v. *United States*, 252 U. S. 140, 146; *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152. If Congress confirmed the regulation, it adopted it as a whole, including the requirement of a separate billing of the tax.

The tax imposed by Section 628 of the Revenue Act of 1918 disappeared upon the enactment of the Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227), there being substituted therefor by Section 602 of the 1921 Act a tax of a fixed amount per gallon. But other taxes imposed by the 1918 Act upon the vendor and measured by the price for which certain articles are sold have been continued in later Acts, and the Commissioner has consistently ruled with respect to all of these that the tax can be regarded as passed on to the purchaser and deducted from the amount received to determine the selling price if quoted and billed separately, but not otherwise.

Thus the excise tax imposed by Section 900 of the Revenue Act of 1918 upon the selling price of various commodities was continued with decreasing

schedules of commodities as Section 900 of the Revenue Act of 1921 and as Section 600 of the Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 322) and of the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 93). Article 3 of Regulations 47, as issued on May 1, 1919, and as revised in December, 1920, deal with the tax imposed by Section 900 of the Revenue Act of 1918 and are set forth in Appendix D. Revisions of Article 3 of Regulations 47 on January 6, 1922 (T. D. 3278), August 29, 1924 (T. D. 3630), and May 1, 1926 (T. D. 3862) deal with the tax under the later Acts and are not substantially different from the revision of December, 1920.

The tax on works of art, sold by any person other than the artist, imposed by Section 902 of the Revenue Act of 1918, and the tax upon certain sales of jewelry by dealers, imposed by Section 905, both taxes being based upon "the price for which so sold," were continued by Sections 902 and 905 of the Revenue Act of 1921, and Sections 602 and 604 of the Revenue Act of 1924. Article 1 of Regulations 48 issued May 2, 1919, deals with these taxes and is set forth in Appendix E. Revisions of January 12, 1922 (T. D. 3279), and September 16, 1924 (T. D. 3632), make no substantial change.

It appears, therefore, that although the Commissioner has always construed the words "the price for which so sold" as being the total amount received if the tax is not quoted and billed separately and as being that amount less the tax if the tax

is quoted and billed separately, nevertheless Congress has continued to use the words without change or definition. It may be said, therefore, that Congress has approved and ratified the Commissioner's construction. That the regulations should be upheld if possible is of course desirable. They have been in effect for almost ten years and a vast number of returns have been made and taxes paid in reliance upon them. To collect the additional taxes which would be due if the regulations were declared invalid would be impossible in most cases as well as unfair to manufacturers, who in fixing their prices must have taken into account the amount of tax supposed to be due.

III

WHETHER OR NOT ARTICLE 8 OF REGULATIONS 52 IS VALID THE PETITIONER CAN NOT SUCCEED

If the provision of the regulation providing that the tax, as such, if separately billed may be passed on to the purchaser and the amount received by the seller divided into two items, selling price and tax, is invalid, the tax must always remain where it is originally imposed, that is, on the seller. Under such circumstances there could, of course, be no basis for the petitioner's contention that part of the amounts received by it was received as tax and was not part of the price for which its products were sold.

But the petitioner's contention is that the portion of the regulation permitting the tax, as such,

to be passed on to the purchaser is valid, but that the portion of the regulation requiring separate billing to accomplish this passing on is invalid; that the notice given by the petitioner to its customers that its prices included the sales tax, which would be paid by the petitioner, was sufficient to pass on the tax, as such, to the customers. This contention seems to us to be utterly illogical. As pointed out above, we believe that if the regulation is valid it must be because of Congressional ratification. Such ratification applies equally to both portions of the regulation, and if the provision permitting the tax to be passed on is valid, so must be the requirement of separate billing to accomplish this. We consider it entirely immaterial whether there was any sound reason for the requirement of separate billing. It has been suggested that such billing facilitated auditing of tax returns, but whether or not this was so the requirement was inserted in the regulation and if the regulation was ratified by Congress it was with the requirement included. The petitioner did not comply with the requirement and has no right to complain.

IV

THE CASES IN THE LOWER COURTS

Several cases in the lower Federal courts have involved claims similar to that of the petitioner in the present case. In *Clicquot Club Co.* v. *United States*, 13 F. (2d) 655, the District Court for Mas-

sachusetts decided in favor of the taxpayer, and no appeal was taken. In *Elmer Candy Co., Inc.* v. *Fauntleroy, Collector*, 19 F. (2d) 664, the District Court for the Eastern District of Louisiana decided in favor of the Collector. The judgment of the District Court was reversed by the Circuit Court of Appeals for the Fifth Circuit, 24 F. (2d) 95. Certiorari was granted by this Court May 28, 1928, and the case is now pending as *Fauntleroy* v. *Elmer Candy Company, Inc.*, No. 119, October Term, 1928. In *White Rock Mineral Springs Co.* v. *Edwards*, 23 F. (2d) 539, the District Court for the Southern District of New York decided in favor of the Collector.

CONCLUSION

The judgment of the Court of Claims was right and should be affirmed.

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DECEMBER, 1928.

APPENDIX A

PROVISIONS OF THE REVENUE ACT OF 1918, OTHER THAN SECTION 628, IMPOSING A SALES TAX ON THE VENDOR MEASURED BY SELLING PRICE

SEC. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum: * * *.

There follows a schedule of twenty other classes of commodities upon which taxes at various percentages are imposed.

SEC. 902. That there shall be levied, assessed, collected, and paid upon sculpture, paintings, statuary, art porcelains, and bronzes, sold by any person other than the artist, a tax equivalent to 10 per centum of the price for which so sold. This section shall not apply to the sale of any such article to an educational institution or public art museum.

SEC. 903. That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which

is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

SEC. 905. That on and after April 1, 1919, there shall be levied, assessed, collected, and paid (in lieu of the tax imposed by subdivision (e) of section 600 of the Revenue Act of 1917) upon all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with, precious metals or imitations thereof or ivory (not including surgical instruments); watches; clocks; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars; upon any of the above when sold by or for a dealer or his estate for consumption or use, a tax equivalent to 5 per centum of the price for which so sold.

Every person selling any of the articles enumerated in this section shall make returns under oath in duplicate (monthly or quarterly as the Commissioner, with the approval of the Secretary, may prescribe) and pay the taxes imposed in respect to such articles by this section to the collector for the district in which is located the principal place of

business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Appendix B

PROVISIONS OF THE REVENUE ACT OF 1918, IMPOSING A TAX UPON THE PURCHASER MEASURED BY THE "AMOUNT PAID"

1. *The tax on transportation and other facilities.*

SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another; and a like tax on the amount paid for such transportation within the United States of property transported from a point without the United States to a point within the United States;

Then follow similar provisions taxing at various rates other transportation and similar facilities.

SEC. 501 (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * *

Paragraphs (c) and (d) provide that if the carrier, because of ownership of the goods transported, or for any other reason, does not receive the amount

it would otherwise charge, it must itself pay the tax.

SEC. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

No carrier collecting the taxes imposed by subdivision (a) or (b) of section 500 shall be required to list the amount of such tax separately in any bill of lading, freight or express receipt, or other similar document, if the total amount of the transportation charge and the tax is stated therein.

Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return.

The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

2. *Taxes on admissions and dues.*

SEC. 800. (a) That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—

(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;

(2) In the case of persons (except bona fide employees, municipal officers on official business, persons in the military or naval forces of the United States when in uniform, and children under twelve years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted;

(3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner pro-

vided in section 903, by the person selling such tickets;

(4) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(5) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; and

(6) A tax of 1½ cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise.

* * * * *

SEC. 801. That from and after April 1, 1919 there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by sec-

tion 701 of the Revenue Act of 1917, a tax equivalent to 10 per centum of any amount paid on or after such date, for any period after such date, (a) as dues or membership fees (where the dues or fees of an active resident annual member are in excess of $10 per year) to any social, athletic, or sporting club or organization; or (b) as initiation fee to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees (not including initiation fees) of an active resident annual member are in excess of $10 per year; such taxes to be paid by the person paying such dues or fees: * * *.

SEC. 802. That every person (a) receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 800 or 801 from the person making such payments, or (b) admitting any person free to any place for admission to which a charge is made, shall collect the amount of the tax imposed by section 800 from the person so admitted. Every club or organization having life members, shall collect from such members the amount of the tax imposed by section 801. In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner as provided in section 502.

3. *Taxes on sales by dealers of articles at prices in excess of amounts specified.*

SEC. 904 (a). That on and after May 1, 1919, there shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of so much of the amount paid for any of the following articles as is in excess

of the price hereinafter specified as to each such article, when such article is sold by or for a dealer or his estate on or after such date for consumption or use—

(1) Carpets and rugs, including fiber, except imported and American rugs made principally of wool, on the amount in excess of $5 per square yard;

* * * * *

Then follow provisions similar to those of paragraph (1) with respect to nineteen other classes of articles.

(c) The taxes imposed by this section shall be paid by the purchaser to the vendor at the time of the sale and shall be collected, returned, and paid to the United States by such vendor in the same manner as provided in section 502.

4. *Taxes on toilet articles, proprietary medicines, etc.*

SEC. 907 (a). That on and after May 1, 1919, there shall be levied, assessed, collected, and paid (in lieu of the taxes imposed by subdivision (g) and (h) of section 600 of the Revenue Act of 1917) a tax of 1 cent for each 25 cents or fraction thereof of the amount paid for any of the following articles when sold by or for a dealer or his estate on or after such date for consumption or use;

Then follows a schedule of various toilet articles, proprietary medicines, etc.

(b) The taxes imposed by this section shall be collected by whichever of the following methods the Commissioner may deem expedient: (1) by stamp affixed to such article by the vendor, the cost of which shall be re-

imbursed to the vendor by the purchaser; or (2) by payment to the vendor by the purchaser at the time of the sale, the taxes so collected being returned and paid to the United States by such vendor in the same manner as provided in section 502.

Appendix C

Section 1312 of the Revenue Act of 1918—

Sec. 1312. (1) That (a) if any person has prior to May 9, 1917, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and (b) if such contract does not permit the adding of the whole of such tax to the amount to be paid under such contract, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of such tax as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, the tax collected under this Act shall be the tax in force on May 9, 1917.

(2) If (a) any person has prior to September 3, 1918, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Titles VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and in respect to which no corresponding tax was imposed by the Revenue Act of 1917, and (b) such contract does not permit the adding, to the amount to be paid under such contract, of the whole of the tax imposed by this Act, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of the tax imposed by this Act as is not so permitted to be added to the contract price. If

a contract of the character above described was made with any person other than a dealer, no tax shall be collected under this Act.

(3) If (a) any person has prior to September 3, 1918, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and in respect to which a corresponding tax was imposed by the Revenue Act of 1917, and (b) such contract does not permit the adding, to the amount to be paid under such contract, of the whole of the difference between such tax and the corresponding tax imposed by the Revenue Act of 1917, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of such difference as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, the tax collected under this Act shall be the tax in force on September 3, 1918.

(4) The taxes payable by the vendee or lessee under this section shall be paid to the vendor or lessor at the time the sale or lease is consummated, and collected, returned, and paid to the United States by such vendor or lessor in the same manner as provided in section 502.

(5) The term "dealer" as used in this section includes a vendee who purchases any article with intent to use it in the manufacture or production of another article intended for sale.

(6) This section shall not apply to any tax imposed by section 906.

Appendix D

TREASURY REGULATIONS DEALING WITH THE EXCISE TAX IMPOSED BY SECTION 900 OF THE REVENUE ACT OF 1918 UPON THE SELLING PRICE OF VARIOUS COMMODITIES

Article 3 of Regulations 47, issued May 1, 1919, was as follows:

> The tax is on the sale by the manufacturer of the taxable article. It is measured by the price for which the article is sold. It is on the actual sales price of the goods sold, and not on the list price, where that differs from the sales price. If the price of a taxable article is increased to cover the tax, the tax is on such increased price. Where, however, the tax is billed as a separate item such amount need not be included in the price of the article in computing the tax. The tax is payable in respect to a sale made, whether or not the purchase price is actually collected.

By the revision of December, 1920, Article 3, Regulations 47, was amended to read as follows:

> The tax is imposed on the sale by the manufacturer and should be returned and paid by him whether the sales price is actually collected or not. It is measured by the price for which the article is sold by the manufacturer and not by the list price where that differs from the actual sales price. If the price of a taxable article is increased to cover the tax, and the article is sold at such price, including the tax, the tax is on such increased price.
>
> The manufacturer may reimburse himself in the amount of the tax by agreement with

the purchaser in the following manner: (a) By quoting the selling price and the tax in separate and exact amounts, and where invoices are rendered, by segregating these amounts on the invoices as outlined in examples (1) and (6) below; or (b) by stating to the purchaser in advance of the sale what portion of the quoted price represents the price charged for the article and what portion represents tax, and where invoices are rendered by invoicing in the manner outlined in examples (2) and (3) below, in which cases the amount of the tax need not be included in the price of the article in computing the tax.

Where goods are ordered direct from the manufacturer with no agreement as to price, the tax is based on the amount billed or invoiced to the purchaser as the selling price. Mere statements or agreements that the quoted or contract price includes the tax do not operate to exclude any part thereof from tax, unless the price is billed in the manner outlined in example (1), (2), (3), or (6) below.

Where a lump sum is specified as the price of a taxable article or articles, and other articles not taxable and not a component part of the taxable articles are included in the price, the tax attaches to the entire amount unless the selling price of the taxable and nontaxable articles are segregated. In such case the tax will be measured by the price specified as the selling price of the taxable article or articles (examples 4 and 5). The following examples illustrate a method by which the manufacturer may separate the tax from the selling price in invoicing goods to the purchaser.

Example (1). A, the manufacturer, quotes a selling price to B of $1 and bills the goods to B as:

"Article No. 1, selling price, $1; tax, $0.05."

Example (2). A, the manufacturer, quotes a selling price of $1.05, stating that the price includes a tax of 5 cents, and bills the goods to B as:

"Article No. 1, selling price $1.05, 5 cents of the total represents tax."

Example (3). A, the manufacturer, quotes a selling price of $1.05, stating that 1/21 of the price represents tax, and bills the goods to B as:

"Article No. 1, selling price $1.05, 1/21 of the total represents tax."

The tax in examples (1), (2), and (3) is computed upon $1, the quoted and actual selling price.

Example (4). A, the manufacturer, quotes a cost price or contracts to sell goods at $1.05, including tax, and bills the goods to B as:

"Article No. 1, selling price, including tax, $1.05."

The tax is computed upon $1.05, the quoted and invoiced selling price.

Example (5). A manufacturer sells an automobile to B, including insurance, gas, and oil, and bills it as:

"One car, $2,150."

The tax is based on the full amount of $2,150.

Example (6). If in example (5) the invoice separates the charges into items as "car $2,000; gas and oil $20, insurance $30, tax $100," the tax is based on $2,000, the selling price of the car as specified.

APPENDIX E

TREASURY REGULATIONS DEALING WITH THE TAX ON WORKS OF ART, SOLD BY ANY PERSON OTHER THAN THE ARTIST, IMPOSED BY SECTION 902 OF THE REVENUE ACT OF 1918, AND THE TAX UPON CERTAIN SALES OF JEWELRY BY DEALERS, IMPOSED BY SECTION 905

Article 1 of Regulations 48 issued May 2, 1919, was as follows:

> ARTICLE 1. *Basis of tax.*—The tax is measured by the price for which the article is sold. It is on the actual sales price of the goods, and not on the list price, where that differs from the sales price. If the price of a taxable article is increased to cover the tax, the tax is on such increased price. Where, however, the tax is billed as a separate item, such amount need not be included in the price of the article in computing the tax. The tax is payable in respect to a sale made whether or not the purchase price is actually collected. A discount for cash or other discount made subsequently to the sale can not be deducted in computing the price for the purpose of the tax. Where, however, articles are sold over a period of time under an agreement for a quantity rebate, the tax, if originally computed on the gross price, may be adjusted in the return for the month in which the price is finally determined. Commissions to agents and other expenses of sale are not deductible from the price. If articles are sold and the delivery charges to point of delivery are paid by the purchaser

as a specific item, or if they are sold delivered at a sum less delivery charges to be paid by the purchaser, such charges need not be included as a part of the price of the goods; but if the vendor sells goods at a delivered price and pays the delivery charges, he is not entitled to make any deduction on account of the inclusion in the price of such charges.

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